VIRGINIA
LAW REVIEW

VOL. IV. FEBRUARY, 1917 No. 5

PROBLEMS OF THE LAW'S MECHANISM IN AMERICA.*

METHODS OF MAKING LAW.

WE COME now to problems of the present, in legal science. Let us select that one which is the most prominent, the most important and the most deeply rooted in legal science, viz., the problem of Legal Method. Let us plunge directly into it, by asking these questions: *Why* is a judge? *Why* is a legislator? Why do we go to the legislator for one mode of legal activity, and to the judge for another? Why do we go to the legislator to ask for an abstract declaration of a desired rule of law, but to the judge for a concrete application of some existing rule to a dispute between specific persons? Why do we not, for example, go to the judge for the former, and to the legislator for the latter?

Is it because they are elected by different political *powers?* No; because in most states they are alike elected by popular vote.

*EDITORIAL NOTE: This is the second of a series of three lectures delivered at the University of Virginia by Dean Wigmore, on the Barbour-Page Foundation. The subject of the first lecture, which was published in the January, 1917, issue of the VIRGINIA LAW REVIEW, p. 247, was "The Past: Problems of the Law's Evolution." The title of the second lecture, which is printed above, was "The Present: Problems of the Law's Mechanism in America." The title of the third lecture was "The Future: Problems of the Law's Adjustment between Nations." These lectures will be published in book form by the Barbour-Page Foundation.

Is it because they have essentially different *qualifications?* No; because the judges are invariably selected from the body of practitioners of law, and the judiciary committees of the legislatures (which make most of the laws) are also composed of lawyers.

Is it because they *do* different things with the law, the one "making" it (as we say), and the other merely applying a law already made? Not essentially; because there are numerous orthodox instances in history of the judge making a legal principle; for the bulk of the common law was "made" by them, and the fellow-servant rule in employer's liability is a typical modern instance. And because the legislator, conversely, may decide particular controversies; witness the common law rule that divorces were grantable only by Parliament, and the numerous so-called "private acts" still common in modern times; witness the Federal Court of Claims, whose work was formerly done by Congress; and the early colonial legislatures.[1]

This distinction between judge and legislator is apparently not essential; it is merely dominant and customary. And if it is not essential, why need it be preserved? Why might not the judge legislate more than he does? Why may he not unmake as well as make law, if need be? Why does the law-declaration of a legislator, i. e., a statute, have to be obeyed, unbroken, by the judge, though the legislator is free to unmake and change the law-declaration of the judge? Why not reverse this, and allow the judge to modify the legislative statute in his discretion, while forbidding the legislator to override the decisions of the judge? Why, indeed, must there be *two* separate functions? Why not merge them in a single officer or body of officers?

These questions, radical though they seem, are soon to become questions of the day. We have reached a point in American law and justice where intelligent progress is impossible until we have answered them to satisfy ourselves. Nor are

[1] E. g., in Rhode Island, "originally the General Assembly seems to have considered itself a court as well as a legislature." Chief Justice Durfee, quoted in Justice Stiness' essay on Samuel Ames, 5 LEWIS, GREAT AMERICAN LAWYERS 301.

they *our* questions only; they represent the great current theme of discussion among Continental jurists in all countries for the last twenty years. It is a remarkable coincidence in the evolution of law that Europe and America, differing so in their past legal careers, should now have come to a stage where the same general issue is presenting itself at the same epoch of time.[2]

Not that the problem is quite the same, of course, on the Continent. There the background of it is represented by the dominance of comprehensive codified law, and the struggle is to give judicial discretion a modifying power, in order to avoid the huge task of a complete legislative reconstruction. Here, on the other hand, the codes do not so broadly dominate the law, and the struggle is rather to free the judges from the incubus of their own mass of precedents, without resorting for that purpose to an incompetent legislature. But it is probably impossible to put ourselves fully into the undercurrents of the Continental movement of thought. We can only note that the resultant issues of theory are much the same; and we may now proceed to look more closely into the nature of our own problem.

Taking just a glance at history, it reveals that the separation of function between judge and legislator has not always prevailed. In several peoples, the early kingly power was both judicial and legislative; in England, for example, both the House of Lords and the High Court of Justice are modern offshoots of the early King's Council, in which he enacted laws and dispensed justice alternately, by the same kingly power. So too in France, where the Parliament retained until the revolution both legislative and judicial powers. The same person, however, may conceivably be performing two separate functions. And we may now ask whether in the nature of law there *are* two separate functions.

As we saw in the first Lecture, one of the formal elements of law is *uniformity, generality,* a rule more or less abstract. And this uniformity consists in selecting one or more circumstances common to numerous situations involving human conduct, and

[2] The Continental discussions are fully set forth in a volume just from the press, THE SCIENCE OF LEGAL METHOD, by various authors (MODERN LEGAL PHILOSOPHY SERIES, Vol. IX, 1917).

declaring that these few circumstances shall produce a certain result, whatever the other variety of circumstances may be. But the rule thus formed is an *abstraction.* And it will never be of any practical consequence so long as it remains an abstraction. In other words, a rule of law is always conceived as being applied sooner or later, i. e., *enforced;* for the enforcement of it represents the second inherent formal element of law. And it cannot be enforced except upon concrete human beings. And the moment it is applied to concrete persons, each person presents once more the infinite variety of personal circumstances. And some of these circumstances, for this or that person, will thereupon be urged as making the abstraction inequitable for that person and his case.

In short, law is obtained by abstraction of a few circumstances out of the varied circumstances of reality; but in applying it, we are once more plunged into reality and its variety. This application of it is what we mean by *justice.* Hence the inherent contrast between law—the abstract—and justice—the concrete—a contrast inherent and forever inescapable. The great problem is, how to preserve both? Experience has taught us that masses of men *must* be ruled by general principles; but it has also taught us that these generalities are merely abstractions and ignore concrete realities, and therefore will sometimes lead to results undesirable because inconsistent with the merits of the individual case when surveyed in all its circumstances. Hence, the problem is to combine rigidity with flexibility,—law with justice.

Let us take an example not clouded with legal traditions: A theatre manager makes an absolute rule that every person applying for entrance to the play shall present a ticket. Suppose that out of one thousand persons applying for entrance, twenty bring no tickets. The gate-keeper questions each of these twenty; fifteen urge that they desire the pleasure of seeing the play but have no money; this excuse he easily holds to be a vain one. (Is it? Why should not the poor have the pleasure of the drama, in a municipal theatre, for example? However, our economic views find no injustice in denying this.) The sixteenth applicant urges that he desires to see the play because his sister is leading lady; the gate-keeper holds this to be no excuse. The seventeenth de-

clares that he is a dramatic critic; the eighteenth is a cousin of the gate-keeper himself; the nineteenth professes to have lost a ticket which he had once bought; these facts also the gate-keeper decides to be no reasons for exemption. The twentieth is a father seeking his little girl, who has been taken into the play by a companion, contrary to the family's wishes, and the father desires merely to enter and find the little girl and take her home. This too is plain violation of the rule; but the justice of his claim (let us assume) is equally plain. Here the gate-keeper ought certainly to admit. And yet the rule would be broken thereby.

Here, then, are the elements of our problem. The rule about tickets is a mere abstraction until the applicants begin to come; but each applicant brings a great bundle of personal circumstances; and the application of the rule as a rule must ignore all these circumstances. Yet in twenty or more out of every thousand cases the rigid enforcement of the rule is incongruous with the just demands of some of those other circumstances. How shall we meet this dilemma?

Take first the judicial aspect of the problem. Shall the gate-keeper be given discretion to exempt from the rule whenever he pleases? If so, would not the exemptions often undermine the rule and cut off the profits of it? And would not the gate-keeper be inconsistent with his own decisions on different days, and the several gate-keepers be inconsistent with each other? And where can we expect to obtain gate-keepers wise enough to make just exemptions? And will the justice of the gate-keeper correspond with the sense of justice of the managers?

Take next the legislative problem. Can the manager obviate the need for the gate-keepers' discretion, by specifying certain general exceptions when he makes the rule? Is the manager capable of foreseeing all the cases that might thus call for a decision? And as conditions change, will these exceptions be futile, because no longer needed or demanded? And, as the manager has other primary duties, can we assume that he will always be expert enough to understand what justice requires or what the directors' sense of justice would expect? Can the manager's legislation be prompt enough to modify the rule as new situations arise—if, for example, an insane man in the audience becomes violent and his guardian is sent for to take charge of him?

This example may serve to set before us, freed from the confusing associations of legal tradition, some main aspects of the present-day problems of law and justice—the mode of making and using law by legislator and judge. The problems are inherent and permanent. They are inseparable in every system of law and justice, past, present, or future. What is their specially *present* aspect?

Their present aspect is this: Hitherto, in our system, a certain line of adjustment between law and justice has been reached and settled; but this line is now questioned; it is argued that the times demand a readjustment. There were several possible ways of answering the questions above put, and of alotting the respective tasks of judge and legislator; the answer that has hitherto served is no longer satisfactory; shall we now take a different answer, and reconstruct our system upon it, until, in some later century, that also becomes unsatisfactory? For we must concede that no one way of solving the problem is inherently required. It is simply a question whether the way hitherto chosen is working well, and if not, whether another way will certainly work better, for us at least.

Let us attempt to analyze the possibilities:

I. The Judicial Problem.

1. *Is it necessary that the judge should be the intellectual slave:* (a) of the legislators? (b) of the judge's own precedent?

(a) *Is the judge to be absolutely under the statute?* This is perhaps the hardest question of all. It is the one that most troubles the Continental thinkers. With us, the supremacy of the statute has been unquestioningly assumed. Perhaps there are ways of improving the mode of making statutes; we shall consider that in a moment. But assuming the statute to be perfected, must it still bind the judge? May we not, instead, consider the judge as entitled always to make exceptions to the statute where justice demands?

In answering this, let us not deceive ourselves by any sanctimonious fictions about the "will of the people" as embodied in the statute. The people of this State do not write the words of

the statute; a few men in a committee of the Legislature write it; and these few men may have bribed or bullied or wheedled a minority of the voters (the majority seldom vote) of small districts into electing them, and in any event, they may lack wisdom. Hence, while the statute is law, it is not necessarily wisdom. Moreover, it is an abstraction; and the lawmakers could not possibly foresee, nor mention if they did foresee, the special concrete case which the judge sees before him.

Why, therefore, may not the judge be given a general power to flex the statute? We have scores of instances of such a method. Our family government is built that way. Many parts of our administrative law are so built. Our foreign relations are thus managed by the President. Ways could be devised for checking unwise discretion, by requiring a report monthly or annually. The harm, if any, would hardly extend beyond the individual case. The statute would remain in force, and in most cases would be rigidly enforced. Theoretically, there is no objection to recognizing this power in the judge. Two practical objections I will notice later.

(b) *Is the judge to be bound by his precedent?* This part of the question ought not to trouble us over-much. *Stare decisis,* as an absolute dogma, has seemed to me an unreal fetish. The French Civil Code expressly repudiates it; and though French and other Continental judges do follow precedents to some extent, they do so presumably only to the extent that justice requires it for safety's sake. *Stare decisis* is said to be indispensable for securing certainty in the application of the law. But the sufficient answer is that it *has* not in fact secured it. Our judicial law is as uncertain as any law could well be. We possess all the detriment of uncertainty, which *stare decisis* was supposed to avoid, and also all the detriment of ancient law-lumber, which *stare decisis* concededly involves,—the government of the living by the dead, as Herbert Spencer has called it.[3]

[3] The great Jefferson was perhaps the first thinker to use this thought. 3 RANDALL, LIFE OF THOS. JEFFERSON 588. Letter to Madison, Paris, September 6, 1789: "The question, whether one generation of men has a right to bind another, seems never to have been started, either on this or our side of the water. * * * I set out on this ground, which

Of course, there are rules of property and contract which require stability, and *stare decisis* is a sound principle to employ for them. But just as the principles of non-retroactivity of laws and of non-impairment of obligations are flexibly applied, where needed, by the judges, so also *stare decisis* has only a limited merit. It is the absolute and universal rigidity of the principle that is unsound. And our judicial history shows that such rigidity is needless. "We do not sit here," said Lord Mansfield, "to take our rules of law from Keble or Siderfin," meaning the decisions of 150 years before his day. And in Oklahoma, Chief Justice Furman has shown, in the last ten years, that a civilized community can dispense with intellectual slavery to *stare decisis*. (I pause to offer tribute to the memory of this courageous judge, recently departed.) The Supreme Court of Kansas also deserves honor for having cast off its rigid fetters.

We can afford to ask: Is it necessary for the supreme judge to feel *chained* by any line of precedents? May he not repudiate the chain, and hold himself free to follow precedent only when required thereto because the faith of contracts and the toil of property has been rested on them? [4]

But we now meet a practical objection: 2. *Can we trust the judge to have wisdom in using his discretion to exempt from statutes and to ignore precedents?* Most people will promptly answer in the negative. Their reasons, if asked, are reducible to two: (a) History exhibits the growth of abuse of such power; (b) our own judiciary exhibits no capacity for it.

(a) The argument from history is probably fallacious. Take the extreme instances of the English judges under Charles II and James II, and the French criminal judges under Louis XIV

I suppose to be self-evident, that the *earth belongs in usufruct to the living;* that the dead have neither rights nor power over it. * * * No society can make a perpetual constitution, or even a perpetual law." *Ibid,* p. 651, Letter to Kercheval, Monticello, July 12, 1816: "The dead have no rights. * * * The present inhabitants alone have a right to direct what is the concern of themselves alone, and to declare the law of that direction."

[4] "The Process of Judicial Legislation," by Prof. M. R. Cohen of the College of the City of New York, 48 AM. LAW REV. 161, is an enlightened discussion of the whole subject.

and earlier. These instances come from a period when judges were but political branches of royalty. The position of a judge was never before so independent in theory as it is today in England and America. We have no reason to assume that inherently history must repeat itself. And remedies and checks exist today which were unknown in former times.

(b) The argument from present conditions is of course self-stultifying. We have, and shall have, as good judges as we deserve. We can have competent judges any time, when two things exist: First, when citizens use their best common sense in electing them, not their blind partisan prejudice; and secondly, when the best lawyers must accept the honor of the post, and not seek merely money by preferring lucrative practice to judicial positions. Whether we do have today judges competent to use greater power is immaterial. The point is that we *can* have them whenever we, lawyers and citizens, become sensible and unselfish enough to want them.

3. But another practical doubt remains, if we grant to the judge a freedom from resort to precedents: *What materials of reasoning shall he use, in substitution for precedents?* That is, in applying abstract law to do concrete justice, there must be some standard of guidance for the judge. We do not want the meaningless justice of the traditional Arabian sheik—the justice of individual whim and momentary notion. If, then, he is not to be mechanically controlled by statute and by precedent, what shall be the substitute?

The change in scope of reasoning would not necessarily be as cataclysmal as it might seem. There will always be a controlling intellectual influence by the settled law, wherever a professional class fills the bench. This has been so from the time of the priest-judges of primitive times until to-day. Moreover, there is a large material furnished by common sense (common and undisputed, that is) and by common policies. Beyond this lies a field of questionable scope. And no doubt there is room for speculation as to the use of this field by the judges. Can they safely be turned loose into it? This is the problem of a *"freie Rechtsfindung"* and *"libre recherche,"*—the needs and

dangers of which are discussed in current Continental literature by the trenchant pens of Geny, Ehrlich and other jurists.

Let us not minimize these dangers of uncertainty; let us merely not exaggerate them. And, for consolation in the prospect of them, let us recall at least two relevant circumstances:

(a) In the first place, our own Supreme Courts have long been drawing copiously and consciously from this unbounded field of public policy. The opinions are full of such discussions. Some of the greatest questions of the day have been settled with no more definite guidance and control. Examples taken at random are: the decisions settling the law of illness caused without impact (nervous shock, "railway spine," etc.), where the known conditions of modern personal injury litigation have furnished the main grounds of judgment; the law of releases signed by patients in a hospital, where the apparently fixed principles of documentary execution have been subordinated to the policy applicable to such a situation; the law of privilege for torts in general, where modern conditions have at many points required sole reliance upon neither precedent nor statute. And this list might be indefinitely enlarged. An extension of this field of *"libre recherche"* would be no novelty in method.

(b) In the second place, the judge's liberty could in any event not exceed that of the legislators, whose liberty (and license) of reasoning we have long viewed (and suffered) with equanimity. Reflecting on the debate that occurs in a judiciary committee of the legislature, when an ordinary measure of private law is presented, what is the range of reasoning? What of the personal oddities, the maddening irrelevancies, the ignorant assumptions, the crude philosophies, the fragmentary conceptions, the narrow outlook, the obstinate bias, the stolid indifference to facts and needs? These legislators, in their motives and reasonings for a declaration of law, have a *"libre recherche"* indeed. But we have accepted it as a matter of course. Why not accept it for the judges also?

II. The Legislative Problem.

Let us assume that the judicial problem has been solved. And now remains the legislative problem. But first must be faced

the preliminary inquiry: Why have a separate legislator? If, as we have seen, the two functions of law and justice are inherently distinct, is this a reason why the functionaries should be distinct?[5] Theoretically, no. Their merger is conceivable. Examples can be seen in our universities, where the same faculty both enacts the rules of government for the students and also applies the rules to specific cases. So, too, the house committees of clubs, and the directors of boards of trade and stock exchanges, both enact the rules and apply them. But these cases concern small communities only, and the bulk of their affairs is relatively small and simple. In a large State, the functions of legislation and of justice each require an expert body devoted solely to their tasks. And the spirit of each task is so different —one that of generalization, the other that of concrete application—that the same person cannot best be concerned with both as a life work. The mental attitude best for the one conflicts with the mental attitude best for the other. Practically then we may conclude that the two functions should be separately vested.

We come then to the main questions of method: And the problem is this, law being abstract, but justice being concrete, and law therefore needing some flexibility, how can legislation be so conducted as to provide the necessary flexibility and no more? We may here assume that the judge has been given some power of using law flexibly; but naturally our result will depend somewhat on this assumption. The three parts of the problem are these: 1. How far should legislation go into details? 2. How far should legislation provide for future change of general conditions? 3. How far should the legislator be an expert?

1. *How far should legislation go into details?* These detailed circumstances are what make up the individual case. Justice deals always with the individual case. The abstraction of the law needs flexibility. Shall the legislator attempt to provide for this by express exceptions or provisos? Of course, he does so

[5] 3 RANDALL, LIFE OF THOS. JEFFERSON 211, Letter of June 20, 1807: "The leading principle of our Constitution is the independence of the legislature, executive, and judiciary." Compare Prof. Cohen's essay, cited above, for a discussion of the principle.

to some extent, habitually. And yet, with what futility. As one example out of thousands, take the statutes on death by wrongful act. One type of statute, which expressly provided for the death of the injured party, forgot to say anything about the claim for the injury received during life-time. Another type of statute made just the contrary omission. Seventy years of interpretation have not served to clarify the legal situation completely. And as late as 1908 the Federal Employers' Liability Act was framed with so little imagination that within a few years important amendments were needed. And the reason is that the actual legislator, at the best, is a human being of limited imagination, and he cannot imagine all or most of the cases in which his abstract rule might need modification. However many provisos he makes, the unimagined possibilities seem as numerous as ever. Is it not a hopeless attempt?

On the other hand, abstract rules are always too large. No legislator wishes to enforce a purely abstract rule; he knows that there must be some exceptions. Moreover, some of the most simple abstractions have been notoriously inadequate, regarded as legislation; because the abstraction has used terms so broad as to leave the whole subject open to the judges. "Thou shalt not steal" seems simple enough; and yet it was so interpreted by the judges that embezzlement and the confidence game, two of the most common wrongs of modern times, were not construed by the judges to fall within its prohibition. The Statute of Frauds, two and a half centuries ago, used two sentences to enact that certain transactions of contract and of sale should be made in writing; and yet whole volumes have been written, both in Anglo-American and in Continental law, to expound the judicial cases decided under that statute; each word of the statute (it has been said) has cost a fortune in litigation to interpret it.

It would seem that inherently there is no canon for determining how far legislation should go into details. There are dangers and advantages in either extreme. This seems to show, then, all the more clearly that legislation, or abstract law-making, is intrinsically incapable of finding a just means. In other words, for the needed flexibility we must always expect to fall back

upon the judicial power. This conclusion emphasizes the need, already seen, of conceding that large judicial power.

2. *How far should legislation provide for future change of conditions?* If the legislator has not adequate imagination for details of present cases, much less has he adequate imagination for future changes in general conditions. No one has. Legislation must, however, provide for them somehow. Curiously enough, this truth is seldom or never realized by the legislator. Neither he nor any of us are apt to remember that life is constantly moving, like a slow river. Hence law is changing, like the dissolving views of a cinematograph. Conditions are sure to change; other factors will become more important; and therefore the factors selected by the law to define its rule will become incongruous with the new conditions. How shall this be provided for?

A simple way, of course, is merely to give liberty to ask for new legislation when new conditions arise. This is our own traditional way, and it seems natural enough. But it often involves great waste and injustice.

(1) In the first place, since law is the result (as already seen) of a conflict of interest, in which one interest is finally given the upper hand over others, the request for new legislation often becomes the signal for another great struggle of the one defeated interest; and then, even if no prolonged deadlock takes place (as it sometimes does), the new adjustment of law often loses something valuable and right that had been once gained; and, in fear of this, it has often seemed best to endure the present ill-fitting law. Here are two examples, out of hundreds. The federal copyright statute was interpreted by the Supreme Court, fifteen years ago not to protect the musical disk-records.[6] Common sense of justice revolted at this; and Congress was asked to amend the statute. Immediately the pirates who profited by this interpretation of the existing law made strenuous opposition; the publishers and other interests joined in the struggle; and the final result was in part a compromise. Again, the Constitution of Illinois, adopted in 1870 (almost the oldest in the

[6] White-Smith Music Co. *v.* Apollo Co., 209 U. S. 1.

Union, except the federal one) is in many respects far behind the needs of the time. For ten years or more, the best opinion has believed that a revision is needed. But if a constitutional convention is held, all sorts of legitimate interests may be attacked and the new constitution may injure them. Hence a reluctance to embark wholesale into this new legislation; and hence a perpetuation of the ill-fitting features of the present law for at least several years more.

(2) A second shortcoming of the present traditional method —that we must ask the Legislature for new statutes whenever new needs arise—is that in the countless smaller matters it is impossible to get the attention of the Legislature, or even to find any one who will try to get their attention. Where no great popular or class interest or strong self-interest is involved, the injustice remains unattended to. For example, grand larceny is a penitentiary offense, but petit larceny is not; now in Illinois the distinction between the two is fixed at the sum of $15—an ancient statute, enacted when money value was different. One who steals $15 must now go to the penitentiary, regardless of the circumstances that mitigate and call for special treatment. The judges have frequently reported that this law is cruel and harmful; but the Legislature has never yet been induced to heed the situation, though no opposition would be found. Thus, though each Legislature annually passes a hundred petty amending acts, it leaves a thousand petty measures unnoticed.

Can legislation in itself provide against such shortcomings? Probably not, without a change to be referred to under my third and last head. Two other methods have indeed been tried. (1) One method is to require the judges to report, annually or oftener, on the defects of the laws. This requirement exists in Illinois and elsewhere. Experience shows it to be a failure, in America; for either the judges do not report (their whole mental attitude being traditionally uncongenial to the legislative point of view); or their report, if made, is not heeded by the Legislature. (2) A second method is to provide a special permanent commission whose duty it is to report periodically on defects in the law. This method is employed in Russia and in Spain. These methods are described by Alvarez and Lambert in their

chapters in the volume entitled "Science of Legal Method," above cited. In Russia it is habitually used; whether to best results, I am not informed. In Spain, I have no information as to its use. But neither method seems capable of success in this country, except as an adjunct to a radical political measure, to which I now come.

(3) *How far should the legislator be an expert?* We have seen that the process of legislation has inherent and insuperable difficulties, both as to provision of details and as to foresight of the future. And these special difficulties are added to the general one of adjusting the abstract rule of law so as to reconcile conflicting interests and interpret the best public opinion. It is needless to insist, therefore, that the legislators should be highly competent, in experience for their task. Are they? Far from it. However high their character, the experience of the majority of members is slender and negligible in quality. They lack not only experience in legislative method, but experience in the subjects of legislation. A few veterans in each legislature really make the laws; but even these are experienced in method only, and seldom in the varied subjects of legislation, nor do they use adequate means to inform themselves. I do not know anything about legislatures of other countries, and I make no comparisons. But judging only by standards of efficiency which I see exemplified around me in other fields, and which indicate the heights of American capacity—I mean in the universities, in industry, in art, in commerce—I venture to say, after considerable observation, that the most incompetent bodies of men in the United States, relatively, are the legislatures of the several States and of Congress. The standard of American achievement is disgraced by their methods and by their product.

This then is the problem: How to constitute our legislatures competently, while retaining the principle of representative government. I see no permanent solution for this problem, other than that proposed in Kansas:[7] Make experts of the legisla-

[7] Bulletin No. 1, Legislative Reference Department, Kansas State Library (1914), LEGISLATIVE SYSTEMS; Chester L. Jones, "Improvement of Legislative Methods and Procedure," 8 AM. POL. SC. REV. 1 (1914); PAUL S. REINSCH, AMERICAN LEGISLATURES AND LEGISLATIVE METHODS, 2 ed. (1914).

tors (1) by reducing their numbers, (2) by giving them longer terms, (3) by paying them enough to justify it as a career for men of talent, (4) by making their sessions continuous.

Every other expert function or occupation requires continuousness. The lawyer's career requires continuousness; why not the legislator's? When once we concede that legislation requires expertness, the conclusion follows inevitably. The Italian cities of the Middle Ages, the most prosperous and brilliant in the world's history, called in professional mayors (or *podesta*) to govern their cities. The American movement for professional "city managers" is another sign of the times in the same direction. Let us have professional legislators.

I am not afraid lest the will of the people will not prevail. In the first place, every American is sensitive to public opinion; and an elected legislator will never fail to defer to any great popular demand. In the next place, the "will of the people" has no place in the details of technical legislation. I say that it has no business to meddle, nor to be considered, in framing technical details. The "will of the people" does not know how the professor of chemistry should teach chemistry, nor how the bridge engineer should build his bridge. The mass of the people—you and I included—are ignorant in the matters, and we should be content to have the technic of legislation unimpressed by our personal will.

I believe in democracy. And I would rather emigrate or die than see the American people Prussianized. But I do not believe that democracy has to be synonymous with incompetency.

John Henry Wigmore.

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